WILLIAM A. STOEVER*

The "Race" for the Seabed: The Right to Emplace Military Installations on the Deep Ocean Floor

The emerging possibility for the emplacement of military installations on the ocean floor presents a new area in which doctrines of international law must be formulated to define those activities which are permitted to States and those which are prohibited. The purpose of this paper is to examine briefly the extent to which the existing body of international law is capable of making this definition and to explore the directions which the development of new doctrines to treat this new realm of activities appear to be taking.

It is the author's basic thesis that the status of the deep ocean floor is as yet largely undefined in international law and that the future definition will be worked out as the synthesis of two competing pressures. On the one hand there is the pressure generated by "state practice," which is inexorably being formulated as technology advances and States continue to expand the scope of their military (and other) activities on the ocean floor beneath deeper and deeper water. On the other hand there is the pressure for some form of agreement, for multilateral regulation of the permissible type and scope of installations which can be placed by individual States on the ocean floor beyond the reach of present national jurisdiction. It appears to the author that the advancement of technology and the concomitant expansion of individual technologically advanced States into increasing areas of the deep ocean floor will decrease the areas over which an agreement establishing some degree of multilateral control can be established. Thus it may be that by the time negotiations on a multilateral agreement are begun, the deep ocean floor will already be sprinkled with

*William A. Stoever, first place winner in the Henry C. Morris International Law Essay Contest; Legal Dept., Federal Reserve Bank of New York; J.D. (1969), Harvard Law School; Member, American Society of International Law; First Place (Northwestern Region) and Fourth Place (Nationally) Philip C. Jessup International Law Moot Court Competition, Spring 1969.

submarine-monitoring devices, missile-launching sites, and other permanent semi-permanent military installations.

1.

The first problem in ascertaining the present state of the law regarding the emplacement of such installations is to determine which are the areas beyond the limits of any State's present jurisdiction. The seaward extent of a State's exclusive rights in the ocean floor surrounding its coasts is now governed by the Geneva Convention on the Continental Shelf.[1] Article 1 of this Convention states:

> For the purpose of these articles, the term "continental shelf" is used as referring (a) to the seabed and subsoil of the submarine areas adjacent to the coast but outside the area of the territorial sea, to a depth of 200 metres or, beyond that limit, to where the depth of the superjacent waters admits of the exploitation of the natural resources of the said areas; (b) to the seabed and subsoil of similar submarine areas adjacent to the coasts of islands.

Since the time of the adoption of the Convention, the dispute as to the seaward extent of a coastal State's exclusive rights has turned primarily on the meaning of the "exploitability" criterion contained in subsection (a). The primary focus of the "exploitability" dispute has been on the distance to which a coastal State can claim exclusive rights under Article 2 of the Convention for the purpose of exploring its own continental shelf and exploiting the natural resources thereof.[2] The question of military rights in the continental shelf has generally been treated as an adjunct of the question of exploitation rights. Certainly if a State is accorded exclusive rights in an area of the seabed for exploitation purposes, under the present state

---

[1]Convention on the Continental Shelf, done at Geneva on 29 April 1958, 15 U.S.T. 471, T.I.A.S. 5578, 499 U.N.T.S. 311.

[2]*See, e.g.*, Burke, Contemporary Legal Problems in Ocean Development, paper presented to the International Institute for Peace and Conflict Research (SIPRI), Stockholm (1968);
Creamer, *Title to the Deep Seabed*, 9 HARVARD INT'L L.J. 205, 220-222 (1968);
Franklin, *Law of the Sea: Some Recent Developments*, INTERNATIONAL LAW STUDIES, U.S. Naval War College, Newport, Rhode Island (1959-1960); Navpers 15031, Vol. LIII, U.S. Govt. Printing Office, Washington, D.C. (1961);
Griffin, *The Emerging Law of Ocean Space*, 1 INT. LAW. 548, 572-578 (1967);
Kunz, *Continental Shelf and International Law: Confusion and Abuse*, 50 AM. J. INT'L L. 828 (1956);
MCDOUGAL AND BURKE, THE PUBLIC ORDER OF THE OCEANS 663-691 (1962);
Oda, *The Concept of the Contiguous Zone*, 11 INT'L AND COMP. L.Q. 131 (1962);
Whiteman, *Conference on the Law of the Sea: Convention on the Continental Shelf*, 52 AM. J. INT'L L. 629, 631 (1958);
Young, *The Geneva Convention on the Continental Shelf: A First Impression*, 52 AM. J. INT'L L. 733, 735 (1958).

of the law it is a relatively small step to include rights for military purposes in the same area.

Some writers appear to feel that under the exploitability criterion a State can now claim that its continental shelf extends to the middle of the ocean floor. Professor Shiguro Oda of Japan argues:[3]

> . . . there is no room to discuss the outer limits of the continental shelf or any area beyond the continental shelf under the Geneva Convention since . . . all the submerged lands of the world are necessarily parts of the continental shelf by the very definition of the Convention.

Even some who oppose the extension of national jurisdiction beyond its present effective limits concede that in fact the seabed can be made subject to exclusive national jurisdiction through the process of national appropriation. United Nations Ambassador Pardo of Malta, one of the leaders in urging the United Nations to assume some form of jurisdiction over the portions of the seabed which are as yet unclaimed, admits:[4]

> Unfortunately the present juridical framework clearly encourages, subject to certain limitations, the appropriation for national purposes of the sea-bed beyond the geophysical continental shelf.

Ambassador Pardo went on to discuss the extent of occupation by the emplacement of installations (including military installations) which might be considered sufficient to acquire exclusive jurisdiction to portions of the seabed, and he drew an analogy to the "scramble for Africa" of the late 19th century, in which large portions of the inland area were claimed on the basis of small settlements on the coastal strips.[5]

On the other hand there are those who urge that the exploitability criterion does not give States license to advance their claims to exclusive jurisdiction further and further onto the unoccupied seabed as technological advances enable use of the ocean floor at greater and greater depths. Professor Burke places emphasis on the "adjacency" requirement of Article 1 of the Geneva Convention on the Continental Shelf, and he states:[6]

> . . . Everyone accepts the idea that the exploitability criterion is subject to the limitations of adjacency.

However, he goes on to admit:[7]

---

[3]22 U.N. GAOR, A/C 1/PV. 1515, 42 (1967).
[4]*Id.*, at 37.
[5]*Id.*
[6]*Supra* note 2, Burke.
[7]*Id.*, at 33-34.

> .... To the present time there has been no authoritative impartial interpretation of the 1958 Convention definition of the shelf which would establish what is meant by "adjacency," and prospects for obtaining one quickly do not appear bright.

In the United Nations there is strong support for the position that the seabed beyond the limits of present national jurisdiction is not open to claims of national appropriation. A United Nations Committee considered the possibility of regarding the ocean-floor as "*res nullius* and susceptible of occupation" but rejected this possibility as only "theoretical."[8]

In the U.S.A., the country which would stand to benefit most immediately from the opening of the seabed to claims of national appropriation based on occupation or exploitation, there is high-level support for the proposition that the entire ocean floor is open to national claims. Dr. John Craven, Chief Scientist of the Special Projects Office of the Department of the Navy, and a lawyer, states:[9]

> It is already established that emoluments of sovereignty or ownership already obtain in the sea bed .... Granting the technology which has been forecast here and using the latter of these definitions [the exploitability criterion], it is clear that the ability to exert sovereign rights in the entire sea bed has already received tacit approval.

Even within the U.S.A., however, there is support in the form of Senator Claiborne Pell's Draft Resolution on ocean space[10] for a declaration that the seabed beyond the limits of present national jurisdiction should not be open to claims of national appropriation. And a spokesman for the military, Dr. Frosch, favors curbs on the right of coastal States to claim exclusive jurisdiction over large areas of the ocean floor, on the theory that it is militarily advantageous to leave the largest possible area of the sea open for the deployment of submarines.[11]

Because of the pressure in the United Nations against unilateral extension of national jurisdiction through the mechanism of the exploitability criterion or other means of occupation, it is the conclusion of the author that the community of nations would not presently allow unilateral claims

---

[8] U.N. Doc. A/AC.135/19/Add.2 (1968).

[9] Craven, *Sea Power and the Sea Bed,* U.S. NAVAL INSTITUTE PROCEEDINGS, Vol. 92, No. 4, 49 (1966).

[10] Resolution to express the sense of the Senate and the President should take all necessary steps to enter into diplomatic negotiations to the end that there shall be concluded, with as widespread acceptance as is possible, a treaty on the peaceful exploration and exploitation of ocean space and its resources, S. Res. 263, 90th Cong., 2d Session, March 5, 1968.

[11] Frosch, Military Uses of the Ocean, paper presented at the Conference on Law, Organization and Security in the Use of the Ocean 2d, Ohio State University, Columbus, Ohio, October 5-7, 1967, at 173-174.

of exclusive jurisdiction over the deep-ocean floor to go unchallenged. In view of the competing considerations within the United States regarding the benefits and harms which could ensue from a series of national declarations of exclusive jurisdiction any considerable distance beyond that presently contemplated under existing national and international law, it appears doubtful for the immediately foreseeable that the United States will be the first country to make such a declaration.

2.

Assuming that there is some portion of the seabed which is not now subject to exclusive national jurisdiction and which will not be made subject to such jurisdiction by the emplacement thereon of exploitative or other installations or by any of the customary modes of acquisition of territory,[12] there is then the question of what rights any State has to emplace military installations on such seabed beyond the limits of the State's present jurisdiction. This is a question of much current debate in the United Nations, and the information and doctrines educed in the process of arriving at a consensus in that forum should be looked to as a first source of evidence of current state practice and of likely directions of evolution of the law regarding military installations on the deep-sea bed.

In 1967 the General Assembly of the United Nations passed Resolution 2340 (XXII)[13] entitled:

> Examination of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of their Resources in the Interests of Mankind.

Certain operative paragraphs of this Resolution stated:

> The General Assembly,
>
> . . . .
>
> 1. **Decides** to establish an *Ad Hoc* Committee to Study the Peaceful Uses of the Sea-Bed and the Ocean Floor beyond the limits of National Jurisdiction, composed of 35 countries to study the scope and various aspects of this item;
>
> . . . .
>
> 3. **Request** the Secretary-General:
>
> (a) To transmit the text of the present resolution to the Governments of all Member States in order to seek their views on the subject;
>
> . . . .

Pursuant to this Resolution the Secretary-General invited member Governments to submit their views on the question, and thirty-four Govern-

[12] *See*, LAUTERPACHT, INTERNATIONAL LAW, Vol. I, eighth ed., 546-578 (1955).
[13] G. A. Res. 2340, 22 U.N. GAOR Supp. 16, at 14; U.N. Doc. A/6716 (1967).

ments responded.[14] The Committee established by paragraph 1 [hereinafter referred to as the *Ad Hoc* Committee] put out a summary of the materials thus collected,[15] but at the time of the present writing it has not yet published a report attempting to synthesize the divergent views into a single statement of "state practice." This is understandable, since the views submitted appeared to be based on States' views of their own best interests as often as they were based on their views of present practice under international law, and there is wide divergence among them. Nonetheless it is possible to make certain generalizations from the material thus far published which could be useful in indicating the directions in which the law of the seabed is likely to evolve, either through state practice or by multilateral treaty.

In the first place, States tended to view the problem of military use of the seabed as part of the larger question of jurisdiction over the seabed for all purposes.[16] Some States felt that the question of military use of the seabed was "premature"[17] or "should properly be dealt with by the agencies concerned with arms control and disarmament, in particular the Eighteen-Nation Disarmament Committee."[18] The Government of the U.S.A. submitted a six-page memorandum in which it enumerated a list of questions which the *Ad Hoc* Committee should review, but it was careful not to commit itself on any specific proposals concerning the problem of jurisdiction over the seabed or peaceful uses thereof.[19] Other governments were not so cautious. Finland, for example, may have felt that the preclusion of military use of the ocean floor was already established in international law, deriving from the principle of freedom of the high seas:[20]

> The Government of Finland wishes to emphasize that it does not accept the exploitation of the ocean floor for military purposes in any form. Thus would, *inter alia*, the principle of freedom of the high seas lose its practical significance.

---

[14]U.N. Doc. A/AC.135/1 through A/AC.135/10 (1968).

[15]U.N. Doc. A/AC.135/12 (1968); *see also* U.N. Doc. A/AC.135/R.3 (1968) and U.N. Doc. A/AC.135/R.3/Add.1 (1968).

[16]*See, e.g.*, the memoranda submitted by the Malagasy Republic, Malta, Mexico, Sweden and Turkey, U.N. Doc. A/AC. 135/1.2 (1968); the memorandum submitted by Italy, U.N. Doc. A/AC. 135/1/Add.2 (1968); the memorandum submitted by Japan, U.N. Doc.A/AC.135/1/Add.3 (1968); the memorandum submitted by Greece, U.N. Doc.A/AC.135/1/Add.7 (1968); and the memorandum submitted by Nigeria, U.N. Doc. A/AC.135/1/Add.9 (1968).

[17]*See, e. g.*, paragraph 3(c) of the memorandum submitted by the Canadian Government, U.N. Doc. A/AC.135/1 at 34 (1968).

[18]*Cf.* the memorandum submitted by the Government of the Netherlands, U.N. Doc. A/AC.135/1 at 22 (1968).

[19]U.N. Doc. A/AC.135/1 at 12 (1968).

[20]U.N. Doc. A/AC.135/1/Add.6 at 2 (1968).

As a very rough generalization, the "underdeveloped" States which submitted memoranda tended to be much more convinced than the more highly industrialized States about the desirability of obtaining agreement on a Convention which would define all States' rights in the seabed and which would bar some or all military use of the seabed. Madagascar, for example, stated:[21]

> The Malagasy Government is of the opinion that the continental shelf should not extend beyond a depth of 200 metres and that beyond that point the ocean floor and its subsoil should remain *res nullius*.

The Sudan, Turkey and Dahomey were among the less developed countries which proposed some form of multilateral guarantee that the seabed would be reserved exclusively for peaceful purposes.[22] The U.S.A. was predominant among the States calling for further study of the problems before any definite conclusion could be drawn.[23] Among the other developed States taking a cautious approach to the question of the conclusion of a Convention were South Africa, the Netherlands, Canada, Denmark, Italy, Japan, Brazil and Greece.[24] Sweden was one of the few industrialized States which favored the conclusion of a Convention, and she advocated a moratorium "aimed at freezing the present situation to avoid claims on the ocean-bed and activities thereon—except scientific ones—until the work of the Committee has been successfully brought to an end.[25]

3.

In view of the obvious and fundamental differences in the opinions of States, it is the conclusion of the author that there is as yet no consensus as to a prohibition in existing international law against the emplacement of military installations on the deep-ocean floor. The *Ad Hoc* Committee has noted that the ocean floor is apparently open to such installations as States are capable of placing there, provided only that the installations do not interfere with other legitimate uses of the ocean floor and of the high seas above it.[26] Evidently States are in fact already engaged in the use of the

[21]U.N. GAOR, A/AC.135/1 at 2 (1958).

[22].*See*, the memoranda submitted by the Sudan, Turkey and Dahomey, U.N. Doc. A/AC.135/1 (1968).

[23]U.N. Doc. A/AC.135/1 at 12 (1968).

[24]South Africa, the Netherlands and Canada, U.N. Doc. A/AC.135/1; Denmark and Italy, U.N. Doc. A/AC.135/1/Add.2; Japan, U.N. Doc. A/AC.135/1/Add.3; Brazil, U.N. Doc. A/AC.135/1/Add.4; Greece, U.N. Doc. A/AC.135/1/Add.7 (all 1968).

[25]U.N. Doc. A/AC.135/1 (1968) and U.N. Doc. A/AC.135/1/Corr.1 (1968).

[26]Legal Aspects of the Question of the Reservation Exclusively for Peaceful Purposes of the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Underlying the High Seas beyond the Limits of Present National Jurisdiction, and the Use of their Resources in the Interests of Mankind, U.N. Doc. A/AC.135/19/Add.1, at 4 (1968).

seabed for at least certain types of military equipment.[27] Thus the author is forced to agree with Professor Burke's statement that:[28]

> Insofar as current practices in military use of the seabed are concerned, it is quite difficult to derive conclusions because most such uses are not, for obvious reasons, well advertised. Nonetheless, it is known that such use is made and, to the writer's knowledge there has not been an instance of conflict with other ocean uses, most of which would be surface or near-surface operations. As far as we know, therefore, current operations can be undertaken without any consequential interference with other uses and can, therefore, without much question be labelled as lawful.

At the same time it is obvious that there is pressure in the United Nations and among publicists against extension of the arms race to the ocean floor. A small step in this direction has already been made by the prohibition in the Nuclear Test Ban Treaty against the underwater testing of nuclear weapons.[29] In addition to General Assembly Resolution 2340 (*supra,* page 7) and a 1969 Resolution replacing the *Ad Hoc* Committee with a permanent committee,[30] there are draft resolutions on the reservation of the ocean floor exclusively for peaceful purposes. Among these are a draft submitted by the U.S.S.R. entitled: "Draft Resolution on the Prohibition of the Use of the Sea-Bed and the Ocean Floor beyond the Limits of Territorial Waters for Military Purposes,"[31] and a draft submitted by the U.S.A. entitled: "Draft Resolution on Preventing the Emplacement of Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor."[32] There are also proposals such as that advanced by Malta for the United Nations to assume "ownership" of the seabed and its resources and to regulate access thereto for both exploitative and military purposes.[33]

---

[27]*See, e.g.,* Craven, *Sea Power and the Sea Bed,* U.S. NAVAL INSTITUTE PROCEEDINGS, Vol. 92, No. 4 (1966);
Craven, Technology and the Law of the Sea, paper presented to the Conference on Law, Organization and Security in the Use of the Ocean 1, Ohio State University, Columbus, Ohio, March 17-18, 1967, Vol. II;
Frosch, Military Uses of the Ocean, paper presented at the Conference on Law, Organization and Security in the Use of the Ocean 2d, Ohio State University, Columbus, Ohio, October 5-7, 1967;
Michael, Avoiding the Militarization of the Seas, Commission to Study the Organization of Peace, 17th Report, New Dimensions for the United Nations 39: 167 (1966);
See also The Military Uses of the Sea-Bed and the Ocean Floor beyond the Limits of Present National Jurisdiction, U.N. Doc. A/AC.135/28 (1968).

[28]*Id.,* note 6, at 142.

[29]Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, done at Moscow August 5, 1963, entered into force October 10, 1963; 14 U.S.T. 1313, T.I.A.S. 5433, 480 U.N.T.S. 43.

[30]G. A. Res. 2467 (XXIII) (1969).

[31]U.N. Doc. A/AC.135/20 (1968).

[32]U.N. Doc. A/AC.135/24 (1968).

[33]U.N. GAOR A/C.1/Pv.1515, 67; U.N. GAOR A/C.1/PV.1516, 2-5 (1967).

The very proliferation of proposals is evidence of the variety of forms of regulation which different nations consider desirable. It may be that an eventual compromise will be worked out prohibiting the emplacement of "offensive" weapons (such as nuclear-tipped missiles) while allowing the use of "defensive" equipment (such as submarine-tracking devices). However, at present the differences of approach, as shown in the titles of the drafts submitted by the U.S.S.R. and the U.S.A., may be one of the principal obstacles in the way of the speedy conclusion of a treaty. Furthermore, it does not appear likely that either of the super-powers will be eager to yield the advantages offered by its present technological advances to the control of the underdeveloped "third world" through the mechanism of United Nations ownership or jurisdiction over the ocean floor. Thus it may be some time before any multilateral restriction is imposed on States' rights to make whatever military use they are capable of on the ocean floor.

It appears to the author that the propensity of States to continue to develop the technological capability for the emplacement of military installations on the ocean floor at greater and greater depths will not be altered by the mere possibility that an international agreement barring the continued emplacement and perhaps the use of such installations may be concluded in the future. It is only when such an agreement has actually been signed that States will cease their present efforts to develop more sophisticated ocean-floor equipment. Thus it is the conclusion of the author that, in spite of the submission of the draft resolutions noted in the previous paragraph, the U.S.A. and the U.S.S.R. are engaged in what might appear to be a race against the conclusion of an agreement forestalling the further technological development and deployment of weapons and detection systems on the deep-ocean floor.